STATE OF MICHIGAN

COURT OF APPEALS

DANIEL HARPER,

Plaintiff-Appellant,

v

INLAND WATERS, NATIONAL STEEL CORPORATION, and GREAT LAKES DIVISION OF NATIONAL STEEL CORPORATION,

Defendants-Appellees.

UNPUBLISHED
July 14, 2000

No. 211252
Wayne Circuit Court
LC No. 96-619879-NP

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing his complaint against defendants National Steel and Great Lakes for failure to comply with court orders and the denial of his motion to reinstate his claim, and from an order granting defendant Inland Waters' motion for summary disposition for failure to state a claim. We affirm.

I

Plaintiff first argues that the trial court erred when it granted Inland Waters' motion for summary disposition for failure to state a claim pursuant to MCR 2.116(C)(8) because, contrary to the court's ruling, his complaint, taken as true, along with all reasonable inferences or conclusions, was sufficient to state a claim under the intentional tort exception to the Workers' Disability Compensation Act. MCL 418.131(1); MSA 17.237(131)(1). Plaintiff also argues that he should have been allowed to amend his pleadings pursuant to MCR 2.116(I)(5) and that it was error for the court not to grant him an opportunity to amend his pleadings when it found he had failed to state a claim. We disagree.

We review de novo a court's grant or denial of summary disposition based on a failure to state a claim. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997); *Edelberg v Leco Corp*, 236 Mich App 177, 179; 599 NW2d 785 (1999). However, we review a trial court's decision regarding a motion to amend a pleading for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

"Motions under MCR 2.116(C)(8) test the legal sufficiency of the claim on the pleadings alone to determine if the plaintiff has stated a claim on which relief may be granted. . . . The court must grant the motion if no factual development could justify the plaintiff's claim for relief." *Edelberg, supra* at 179, citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). A grant of summary disposition under subrule (C)(8) should always be with prejudice. *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh, Pa*, 223 Mich App 559, 563; 567 NW2d 456 (1997). However, this does not preclude a plaintiff from requesting leave to amend its complaint before the trial court rules on a motion under (C)(8), and generally, the trial court should normally allow such amendments under MCR 2.116(I)(5). *Id.* at 564. Nevertheless, a court need not provide an opportunity to amend if the evidence before the court shows that amendment would not be justified or if it would be futile. *MacDonald v PKT, Inc*, 233 Mich App 395, 402; 593 NW2d 176 (1999). "Ignoring the substantive merits of the claim, an amendment is futile if it is legally insufficient on its face." *Id.*

To state a claim under the intentional tort exception of the act, one must either allege that (1) an employer "made a conscious choice to injure an employee and . . . deliberately acted or failed to act" so as to further that intent, or (2) an employer's intent to injure may be inferred because the employer "had actual knowledge that an injury was certain to occur under circumstances indicating deliberate disregard of that knowledge." *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180; 551 NW2d 132 (1996). We have previously explained that, under *Travis*, the following alternative elements must be established: either (1) a plaintiff must show (a) a deliberate act by the employer, whether by omission or commission, and (b) that the employer specifically intended the injury, such that the employer had a conscious purpose to bring about specific consequences, or (2) a plaintiff must show (a) actual knowledge that an injury would occur as a result of the employer's deliberate acts or omissions (implied, imputed, or constructive knowledge is insufficient), (b) the injury was certain to occur (probability or conclusory statements by experts are insufficient), and (c) the employer willfully disregarded this knowledge that injury was certain to occur (mere failure to protect someone from a foreseeable harm is insufficient). *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997). It is a question of law for the court to determine whether the facts alleged are sufficient to constitute an intentional tort so that the exception applies. *Travis*, *supra* at 188-189; *Palazzola*, *supra* at 146-147.

Our review of the record indicates that plaintiff failed to plead facts to support his claim. Instead, the complaint merely makes conclusory statements invoking elements of a claim under the intentional tort exception. Such conclusions are insufficient to state a claim. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994). Consequently, the trial court did not err when it granted defendant Inland Waters' motion to dismiss pursuant to MCR 2.116(C)(8).

Plaintiff contends that the court should nevertheless have permitted him an opportunity to amend his pleadings pursuant to MCR 2.116(I)(5). Our review of the record indicates that plaintiff did not

present a proposed amendment to the trial court or otherwise present sufficient factual allegations to state a claim. Plaintiff did not, by offer of proof or otherwise, establish that he could present facts that would demonstrate that defendant committed an intentional tort. Plaintiff's complaint was legally insufficient on its face and amendment of the pleadings would have been futile. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990). Consequently, we conclude that the trial court did not abuse its discretion when it declined to give plaintiff an opportunity to amend his pleadings.

II

Second, plaintiff argues that it was error for the court to dismiss his complaint as to defendants National Steel and Great Lakes for failure to comply with discovery orders. We disagree.

We review a trial court's decision to impose discovery sanctions for an abuse of discretion. *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), citing *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). MCR 2.313(B)(2)(c) expressly authorizes a trial court to enter a judgment dismissing a proceeding against a party who fails to obey an order to provide discovery. *Bass, supra* at 26. A trial court "should carefully consider the circumstances of the case to determine whether a drastic action such as dismissing a claim is appropriate. . . . Severe sanctions are generally appropriate only when a party flagrantly and wantonly refuses to facilitate discovery, not when the failure to comply is accidental or involuntary." *Id.*; citation omitted. Nevertheless, a court need not first impose lesser sanctions prior to resorting to the severe sanction of dismissal. *Id.* at 35.

Defendant National Steel served interrogatories on plaintiff on July 25, 1997. Under MCR 2.309(B)(4), plaintiff was required to answer the interrogatories within twenty-eight days. Plaintiff failed to answer the interrogatories in a timely fashion. On December 3, 1997, a stipulated order was entered that indicated that plaintiff had agreed to provide "full and complete answers" to the interrogatories by October 28, 1997. According to defendant, plaintiff untimely filed unsigned and inadequate answers to the interrogatories on November 13, 1997; defendant accordingly moved on December 5, 1997, to dismiss plaintiff's complaint for failure to comply with the court's order. In his answer to defendant's motion to dismiss, plaintiff admitted that he served his answers to the interrogatories on November 13, 1997; plaintiff went on to assert that discovery was on-going, that it was not scheduled for completion until January 21, 1998, and that he would "amend and submit full and complete answers to [the] interrogatories" by that date. The trial court ordered plaintiff to provide answers to the interrogatories within seven days or the case would be dismissed. Apparently because plaintiff's counsel refused to agree to defendant's proposed order, an order providing that defendant was to provide the answers by December 19, 1997, or the action would be dismissed was not entered until December 22, 1997. In seeking entry of this order, defendant noted that mediation was scheduled for January 21, 1998, and that mediation statements were therefore due on January 7, 1998.

On December 19, 1997, plaintiff sent amended answers to the interrogatories by facsimile; defendant contended that these answers were still insufficient and incomplete. In response, plaintiff's counsel asserted that he had been unable to contact plaintiff to obtain supplementation of plaintiff's answers. Counsel professed a lack of knowledge whether it was plaintiff's illness, or simply plaintiff's

disinterest, that was responsible for this lack of contact. Counsel suggested that the trial court stay the proceedings for ninety days or enter a dismissal without prejudice that would allow for reinstatement on a showing of good cause. On January 27, 1998, the trial court entered an order dismissing plaintiff's complaint without prejudice and providing that if plaintiff failed to move to reinstate the complaint – with a showing of good cause – by March 2, 1998, the case would be dismissed with prejudice. On March 2, 1998, plaintiff moved to reinstate the case, claiming that good cause to reinstate existed by virtue of the fact that plaintiff moved and failed to notify his attorney of his new address until January 16, 1998. In denying the motion to reinstate, the trial court noted that there was a history of problems regarding compliance with the discovery orders, and further concluded that plaintiff had not demonstrated good cause to reinstate the case.

Our review of the record therefore indicates that the court did not immediately dismiss the case, but instead gave plaintiff additional time to comply, dismissing the claim without prejudice but warning plaintiff that dismissal would be with prejudice if the court's order was not complied with by a certain date. Despite a history of not complying with discovery requests, plaintiff was afforded another opportunity to cure the defect, but he did not do so. Plaintiff was required to keep his counsel informed of his whereabouts, but he failed to do so. Defendants could not be expected to file a proper mediation summary without having been provided with adequate answers to their interrogatories, yet plaintiff filed late and inadequate answers while pledging to supplement the answers *by the mediation date.* Even during the period when the case was dismissed, plaintiff made no effort to file amended interrogatories. The failure of plaintiff and his counsel to remain in contact – an excuse that was first mentioned at the hearing on the motion to dismiss – did not constitute good cause either for the failure to comply with the discovery orders or for the motion to reinstate the complaint. On the facts of this case, we find no abuse of discretion by the trial court when it dismissed plaintiff's complaint for failure to comply with court orders to compel discovery.

III

Finally, plaintiff argues that the trial court erred when it denied his motion to reinstate his case because he offered good cause for reinstatement. We decline to reach the merits of this issue because plaintiff has failed to cite authority or argue the merits of this issue. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992). Moreover, as shown by our discussion above, the trial court properly found that plaintiff failed to demonstrate good cause as required by the trial court's order.

Affirmed.

/s/ William B. Murphy
/s/ Jeffrey G. Collins
/s/ Donald S. Owens